HO KOOI SANG

v.

UNIVERSITI MALAYA

HIGH COURT MALAYA, KUALA LUMPUR
WAN AFRAH IBRAHIM JC
[ORIGINATING SUMMONS NO: R2-24-52-2003]
20 AUGUST 2003

ADMINISTRATIVE LAW: *Remedies - Mandamus - Application made under s. 44 Specific Relief Act 1950 - Whether leave necessary*

ADMINISTRATIVE LAW: *Remedies - Mandamus - Application made under s. 44 Specific Relief Act 1950 - Provisos under s. 44(1) Specific Relief Act 1950 - Whether cumulative in effect - Prerequisites for an order under s. 44 Specific Relief Act 1950*

CRIMINAL PROCEDURE: *Coroner's inquiry - Inquiry to discover cause of death - Whether Medical Officer under any legal duty to perform a post-mortem upon an order from a magistrate holding such inquiry - Whether Medical Officer ordinarily duty bound to perform a post-mortem where there is no such inquiry or order - Criminal Procedure Code, s. 335*

The plaintiff's brother died whilst under police custody. A post-mortem conducted by a pathologist with the KL General Hospital found the cause of death to be due to a perforated ulcer. Despite requests, the KL General Hospital refused or failed to give a copy of the report to the plaintiff. The plaintiff thereafter sought for an independent second post-mortem to be conducted by a pathologist at the University Hospital. A Prof Nadesan from the Hospital then gave instructions and details of payment for the post-mortem, which instructions and payment the plaintiff respectively complied with and paid. However, the said Prof Nadesan thereafter declined to conduct the post-mortem. The plaintiff then filed an application to the High Court seeking *inter alia* orders to compel the defendant to conduct the post-mortem and to deliver a copy of the post-mortem report to the plaintiff or his solicitor. The plaintiff resorted to s. 44 of the Specific Relief Act 1950 ('the Act') in making the application. The determination of the application centred on s. 44 of the Act 1950.

Held:

[1] The High Court had the jurisdiction to hear the matter. No leave is necessary for an application under s. 44 of the Act. *Metro Pacific Sdn Bhd v. Ketua Pengarah Kesatuan Sekerja & Anor*. (p 452 c-f)

[2] An applicant under s. 44 of the Act must satisfy all five provisos to the section. The provisos are cumulative in effect and all of them must be fulfilled. *Koon Hoi Chow v. Pretam Singh* [1972] 1 LNS 56. There are also four prerequisites essential for an order under s. 44 of the Act, namely (i) whether the applicant has a clear and specific legal right to the relief sought; (ii) whether there is a duty imposed by law on the respondent; (iii) whether such duty is of an imperative ministerial character involving no judgment or discretion on the part of the respondent; and (iv) whether the applicant has any remedy other than by way of *mandamus* for the enforcement of the right which has been denied to him. (pp 455 f-h & 456 d-h)

[3] An application under s. 44 of the Act must be founded on an affidavit of the person injured stating his right in the matter in question, his demand of justice and the denial thereof. In the instant case, nowhere did the plaintiff's affidavit state that he had such personal right and that his personal right would be injured if the orders sought were not given. There was thus no evidence before the High Court of whether he had a legal right under the Act. It was only in counsel's submission that the court was informed that he was the next of kin, being the deceased victim's brother with no parents. Accordingly the proviso (a) to s. 44(1) of the Act had not been complied with. (pp 457 h & 458 b-d)

[4] By virtue of s. 335 of the Criminal Procedure Code, there would only arise a duty upon the defendant to perform a second post-mortem should the magistrate so order upon an inquiry. On the facts, there was no order of an inquiry and the defendant was thus not under any legal duty to perform the second post-mortem. The High Court could not presume the existence of any legal duty on the part of the defendant unless it was pointed out how that duty existed. (p 459 c-f)

[Application dismissed.]

Case(s) referred to:

Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan [1997] 1 CLJ 665 CA ***(refd)***
Koon Hoi Chow v. Pretam Singh [1972] 1 LNS 56 ***(foll)***
Metro Pacific Sdn Bhd v. Ketua Pengarah Kesatuan Sekerja & Anor [2001] 4 MLJ 616 HC ***(foll)***
Ne Hee Thong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 ***(refd)***
Penang Han Chiang Association Chinese School Association v. National Union of Teachers in Independent Schools, West Malaysia [1988] 1 MLJ 302 ***(refd)***
Thein Tham Sang v. The United States Army Medical Research Unit & Anor [1982] CLJ 820 ***(refd)***

Legislation referred to:

Courts of Judicarure Act 1964, s. 25(2)
Criminal Procedure Code, ss. 331, 334, 335
Federal Constitution, arts. 5(1), 11
Rules of the High Court 1980, O. 7 r. 12, O. 53 r. 1
Specific Relief Act 1950, ss. 20(1)(b), 44(1), 45
Universities & Colleges Act 1971, s. 8

For the plaintiff - M Manoharan (P Uthayakumar, VK Sharma, N Surendran, Dev Anand, P Chandrasegar & Sri Murugan); M/s M Manoharan & Co
For the defendant - PS Ranjan (MS Dhillon); M/s PS Ranjan & Co

Reported by AC Simon

JUDGMENT

Wan Afrah Ibrahim JC:

This is an application made by the plaintiff according to him pursuant to the O. 7 r. 12, Rules of the High Court 1980, the University of Malaya Act 1961, Art. 5(1) and Art. 11 of Federal Constitution, the University Malaya Constitution, s. 8 of the Universities & Colleges Act 1971 and s. 44 of the Specific Relief Act, 1950.

In this case, there are 9 prayers sought by the plaintiff as laid down below:

1) Satu perintah bahawa defendan hendaklah membuat satu bedah siasat (yang kedua) dalam tempoh masa dua-belas (12) jam dari tarikh perintah di sini;

2) Satu perintah bahawa selepas bedah siasat tersebut di buat dan dalam tempoh dua-belas (12) jam dari tarikh perintah di sini defendan menghantarserah kepada plaintif dan/atau peguamcara plaintif laporan bedah siasat interim (interim report) dan/atau laporan bedah siasat penuh (Full Post Mortem Report).

3) Satu deklarasi bahawa defendan adalah sebuah Hospital Awam dan mempunyai tugas utama kepada rakyat (Paramount Public Duties);

4) Satu Deklarasi bahawa Bahagian VIII Bab XXXII Siasatan Mengenai Kematian (Inquiries of Deaths) Kanun Acara Jenayah dan terutamanya s. 334 dan s. 335 Kanun Acara Jenayah adalah tidak terpakai (not applicable) apabila satu bedah siasat (pertama) telah pun dilakukan menurut s. 331 dan/atau s. 335 Kanun Acara Jenayah dan kemudiannya apabila satu permintaan untuk bedah siasat (kedua) dipohon oleh plaintif dan/atau mana-mana rakyat/penduduk Malaysia;

5) Gantirugi untuk jumlah RM500,000 untuk setiap dan tiap-tiap hari bedah siasat tidak dibuat bermula daripada tarikh 6 August 2003 sehingga bedah siasat dibuat;

6) Bayaran sebanyak RM1,000,000 kepada plaintif untuk "pain and suffering", "injured feelings", "anxiety", "distress", "stress and duress";

7) Bayaran sebanyak RM10,000 untuk pembatalan upacara pengebumian Si-Mati yang dijadualkan pada 7 August 2003;

8) General Damages;

9) Special Damages.

In this case, after perusing the file on 13 August 2003 with the certificate of urgency enclosed, the court immediately fixed the case on 14 August 2003. On 14 August 2003, defence counsel En PS Ranjan appeared before the court and informed the court therein that he was only served with the application on 14 August 2003 at 3pm and sought the court's indulgence to file an affidavit in reply. Since the court was of the opinion that this was a matter of urgency, the court allowed time for the defendant to file their affidavit in reply and fixed the hearing date on 15 August 2003. On 15 August 2003, counsel for the plaintiff, En. Uthayakumar stood up before the court confirming that he had received the affidavit in reply from the defendant. He thereon, urged the court to hear the application and make a decision and to give an order for prayer (1) & (2) if possible on that same day and that they had no objection if the defendant be given time to reply to the subsequent prayers.

Basically in this case, the plaintiff is the brother to the deceased named Ho Kwai See. The plaintiff alleged that the deceased had been detained by the police without he and his family's knowledge but was informed of his late brother's death on 5 August 2003. The deceased apparently died on 4 August 2003 and his body was in Sungai Buloh mortuary.

The body was subsequently transferred to the KL General Hospital on 6 August 2003 for a post mortem to be conducted. A forensic pathologist by the name of Dr Sri Pawita Albakri Amir Hamzah conducted a post mortem and the burial permit was subsequently issued stating the cause of death was due to perforated ulcer. The burial permit was tendered in court as exh. HKS1. In the said permit it was stated in the column, "place of stay" at the time of death was "DIBAWA MATI".

The plaintiff and family were not happy as to how the deceased being a fit and joyful person could have died suddenly in the custody of the police or prison authorities and was pronounced the cause of death due to perforated ulcer. The plaintiff believed that the deceased died after being beaten up by the Kota Damansara Police or Sungai Buloh Prison authorities. Hence a police report no. 370/03 was lodged and exhibited as HKS2.

Through a letter written by Tetuan Kumar Hashimah & Co. dated 7 August 2003, the plaintiff had asked for a copy of the post mortem report and the records from the General Hospital but up to the date of this application, the General Hospital had refused or failed to give a copy of the said report.

Being dissatisfied with such conduct, the plaintiff and family instructed their solicitor to seek for an independent second post mortem to be conducted in the Univeristi Hospital. The solicitor acted through a letter to the Hospital dated 6 August 2003 *inter alia* asking the post mortem to be conducted as soon as possible and that the body be returned to the family on 7 August 2003 at or before 2pm. The said letter being exhibited as HKS4.

In response to the same letter, the defendant through a note from Professor Kasinathan Nadesan dated 7 August 2003 replied that the deceased's relatives must first register the body with the A & E and pay RM1,000.

Only then would he be able to perform the post mortem the next morning as he was full up on that day. I again refer to HKS4. Thereon, the plaintiff made the required payment.

Following this, counsel for the plaintiff wrote a letter to the defendant on 7 August 2003 expressing their unhappiness and questioned as to why the post mortem could only be conducted the next morning when the solicitor had received information that the same doctor was not performing any post mortem on the said date. In the same letter, the solicitor for the plaintiff had appealed to the doctor to perform the post mortem on that day itself. - letter HKS 7 referred to. Thus this was the beginning of the problem.

Pursuant to that letter, Professor Nadesan replied that he no longer wished to perform the post mortem, alleging that one person claiming to be a lawyer by the name of Udayakumar had telephoned him that morning demanding and harassing that he complied with such demand. In his letter the doctor alleged that the so-called lawyer was rude, impolite and virtually shouting. He also pointed that doing a post mortem for a fee was at the discretion of the pathologist concerned and that he cannot be forced as such. He then declined to undertake the case. He further contended in his letter that with various unwarranted statement, if he was to conduct the case it could be misconstrued by various mischievous elements. Exhibit HKS8 referred.

The plaintiff's solicitor subsequently replied to the doctor's letter alleging that the second post mortem was not at the discretion of the pathologist as Univeristi Malaya is a public body, hence it is duty bound to perform the operation - HKS9 referred.

By a letter dated 8 August 2003, the defendant's solicitor PS Ranjan & Co wrote a letter to the plaintiff's solicitor informing him in view of the relevant provision of the Criminal Procedure Code, that post mortem could only be considered upon receipt of information from an appropriate police officer or an order from a magistrate.

In reply to that aforesaid letter the plaintiff through his solicitor wrote back alleging there was no such legal provision citing that the defendant had previously conducted three previous post-mortems without any fuss. The solicitor further pointed that the defendant held no discretion but to conduct the said post mortem.

However the defendant's solicitor maintained that by virtue of s. 334 and s. 335 Criminal Procedure Code only a magistrate holding an inquiry into the cause of death of a person who died in police custody may order a post mortem even if a post mortem had been undertaken earlier.

Despite numerous letters being sent, the defendant did not respond to the plaintiff's plea. In the interim the plaintiff had made four police reports accusing the defendant of failing and refusing to perform the said post mortem.

From the affidavit of the plaintiff it could be seen that the plaintiff had also instructed the Timbalan Setiausaha Agung Parti Reformasi Insan Malaysia, En RN Rajah to make an appeal on behalf of the family to the Minister of Health and the Naib Chancellor, Univeristi Malaya respectively asking and pleading that the second post mortem be conducted as soon as possible.

The plaintiff in his affidavit alleged that the defendant was insensitive, inconsiderate and unprofessional and failing in his paramount public duties and abusing his power contrary to the spirit of the University of Malaya Act, Universities and Colleges Act 1971 & the Federal Constitution. The plaintiff through his solicitor wrote further letters to the defendant urging that a second post mortem be considered.

In his affidavit, the plaintiff also alleged that the indifferent attitude towards his family by the defendant and the various authorities had received the sympathy of the public and it had been reported exclusively by the media. After examining the deceased's body, the plaintiff again reiterated that the family believed that the blue black marks must have been inflicted on him as a result of him being tortured during the detention by the police or the prison authority. The plaintiff had taken photographs (14 copies) of the injury on the deceased's body - exhibited HKS19 referred.

The plaintiff further alleged that they had made inquiries to the various private hospitals and none had the facilities to conduct a post mortem. Since up to 12 August 2003 ie, 10 days after the death of the deceased and with the defendant's action being indefinite, the plaintiff and his family's agony continued with no proper burial accorded to their religious rights, and the fact that they had exhausted all other avenues, the plaintiff hereby prayed for this court based on law, facts, humanitarian ground and public interest that an order for post mortem should be given.

After hearing the submission made by the plaintiff's solicitor, the defendant's solicitor stood up before the court and argued that the proper procedure when seeking an order to compel public authority or public officer to perform a duty is by way of judicial review and that the originating summons should be dismissed and that it goes to jurisdiction. Mr PS Ranjan then referred to O. 53 r. 1 of the High Court and said that leave is necessary for a judicial review and that the Attorney General was not made a party and he should have been notified. He also argued that the originating summon procedure is not appropriate especially when there are disputed facts. The second point raised by the learned defendant's counsel was that the specific performance is not available as a remedy for breach of contract to perform personal service. He referred to s. 20(1)(b) of the Specific Relief Act 1980. The case of *Penang Han Chiang Association Chinese School Association v. National Union of Teachers in Independent Schools, West Malaysia* [1988] 1 MLJ 302 was referred to. He further argued that there was no legislation following the introduction of the Criminal Procedure Code which allows the plaintiff to enter into a contract for a post mortem examination of the body of the deceased.

On the issue as to the order of *mandamus*, the plaintiff submitted that there are two pieces of legislation that conferred power to the court for an order of *mandamus* namely s. 44 of Specific Relief Act 1950 and O. 53 of the Rules of the High Court 1980 which must be read together with s. 25(2) and the schedule of the Courts of Judicature Act 1964. In this case, the plaintiff had resorted to s. 44 of the Specific Relief Act 1950. Plaintiff counsel referred to the case of *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan* [1997] 1 CLJ 665 on that point. Since the plaintiff had resorted to s. 44 of the Specific Relief Act 1950, therefore no reliance whatsoever governing the application need to be made under O. 53 of the High Court 1980.

As to whether leave is necessary for an order of mandamus under s. 44 of the Specific Relief Act 1952, the plaintiff submitted that the procedure governing the application for an order of mandamus is provided for under s. 45 of the Specific Relief Act. Unlike O. 53 Rules of the High Court, the plaintiff submitted there was nothing in the Specific Relief Act which stated that leave is necessary for this application. In fact counsel for the pleading referred to the case of *Metro Pacific Sdn Bhd v. Ketua Pengarah Kesatuan Sekerja & Anor* [2001] 4 MLJ 616 at p. 621-622, Dato' KC Vohrah J held that leave was not necessary for an application under s. 44 of the Specific Relief Act 1950:

> It has to be noted that s 44 of the SRA has to be exercised subject to the procedure set out in s 45 of the SRA, but nowhere is it mentioned therein that the procedure therein is subject to any other written law or rules of court relating to the same. This is unlike other provisions in the SRA which are expressly made subject to ' .... the law relating to civil procedure' (see ss. 9, 20(2), 43 and 51 of the SRA). There is nothing in ss 44 or 45 of the SRA to say that leave has to be obtained before application for the remedy is sought for.

As to the question of jurisdiction I am of the opinion that this court of course has the jurisdiction to hear the matter.

With regard to the issue of whether specific performance is available as a remedy for breach of a contract to perform personal service under s. 20(1)(b) of the Specific Relief Act, another counsel for the plaintiff, Mr Surendran however submitted that they were not talking about personal service anymore but public service.

After hearing the submission made by both parties, I adjourned the matter to the following day to make the necessary ruling. However, before I could deliver the ruling that I had the jurisdiction to hear the matter and that leave is not

necessary under s. 44 of the Specific Relief Act, counsel for the defendant stood up and informed the Court that he conceded that there was a decision against them and that O. 53 r. 1 RHC did not support his argument.

Having dropped the issue of jurisdiction and whether leave was necessary, defendant's counsel then proceeded to submit before me that post mortem means examination after death and that when the plaintiff is seeking examination of the deceased body they must go to the Criminal Procedure Code that incorporates both common law and pre existing law. He further submitted that the Criminal Procedure Code gives no authority to a private citizen to order or command a post mortem examination of a body. In this case, the magistrate has the power to order the second post mortem examination. On this point s. 335(ii) of the Criminal Procedure Code was referred to. One point advanced by counsel for the defendant was that the family of the deceased had some right or remedy but an ill defined right of remedy. They need to go to the proper channel and they cannot come to this court. Mr PS Ranjan further submitted that the Registration of Birth Act does not give authority to the holder of a burial permit or a member of the deceased's family to enter into a contract for a post mortem examination to be undertaken.

It was also argued by Mr Ranjan that under s. 44 of the Specific Relief Act that five provisos must be read together and which the applicant must satisfy s. 44 hereby stated as below:

(1) A judge may make an order requiring any specific act to be done or foreborne by any person holding a public office, whether of a permanent or a temporary nature or by any corporation or any court subordinate to the High Court: Provided that:

(a) an application for such an order be made by some person whose property, franchise, or personal right would be injured by the forbearing or doing, as the case may be, of the said specific act;

(b) such doing or forbearing is, under any law for the time being in force, clearly incumbent on the person or court in his or its public character, or on the corporation in its corporate character;

(c) in the opinion of the Judge the doing or forbearing is consonant to right and justice;

(d) the applicant has no other specific and adequate legal remedy; and

(e) the remedy given by the order applied for will be complete.

In other words, the plaintiff must satisfy the court that he would suffer injury to his personal right if the post mortem to the body is not performed. For proviso (b) the plaintiff must show it is already incumbent in law on Prof. Nadesan to perform the post mortem. He reiterated again that proviso (c) and (d) need to be satisfied.

He further added that if the plaintiff is going on contract, how can they compel a public body like the University of Malaya to perform what they claim is a public duty when neither the magistrate nor the prosecutor has ordered the University to perform such a duty.

In reply to the defendant's submission, counsel for the plaintiff, Mr. Manoharan submitted that the defendant did not give a legal reason why they need not conduct the second post mortem and it was just like a judge who refused to hear the case because the lawyer was rude. As such, a doctor should handle the body and not be disturbed by the third party in performing his public duty.

As to the proviso stated in s. 44 Specific Relief Act, learned counsel for the plaintiff, Mr. Manoharan argued that the defendant did not challenge all the averments made by the plaintiff and relied on the case of *Ne Hee Thong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609. As to the proviso (b) of the said Act he submitted it is the duty of the defendant to perform the operation. He further added that the defendant is claiming under proviso (b) and (c) and that the court had a wide discretionary power and that justice requires a second post mortem be ordered because the case gained public interest where there was a death in Sungai Buloh Prison. As such learned counsel submitted that they had complied with the proviso under the Specific Relief Act. Following that another counsel for the plaintiff submitted again that they could not proceed under s. 335 of the Criminal Procedure Court because there was no inquiry.

After hearing the submission by both parties, the court thereafter adjourned the matter to the afternoon to deliver the decision. However after a perusal of the submission made, I subsequently invited both parties to my chamber and instructed both counsels to submit further on the legal requirements of s. 44 Specific Relief Act. When the matter proceeded again in open court, counsel for the plaintiff, En. Manoharan submitted that in the proviso of s. 44(1)(a) of the said Act, the plaintiff's personal right would be injured and that personal right was different from the legal right or property right. The plaintiff is the next of kin being the brother with no parents. He is also the holder of the burial permit. As such his personal right was to learn under what circumstances or in what manner his brother died or who caused his death. He further submitted that to know a person's death was a personal right, more so because

he was the one who paid the RM1,000 to bear the cost of the post mortem. The plaintiff also wished to bring a civil claim against the authorities and the fact that the plaintiff's personal right would also be injured because the deceased's EPF money and whatever civil claim would be injured if the plaintiff was to rely on one post mortem. Having said all this, the plaintiff's counsel further submitted that the plaintiff had the legal right and as the defendant did not challenge by way of affidavit or by law, the plaintiff's claim is deemed to have admitted that the plaintiff has a personal right which would be injured if the post mortem is not conducted. Another last point raised by the plaintiff's solicitor was that if any person claimed the plaintiff had no legal right the burden was on him to prove.

In answer to the plaintiff's submission, Mr PS Ranjan argued that the burden is on the plaintiff to satisfy the provision of s. 44. The right in law must be given by statute or common law and that there is no statute which gives the right to a private citizen to commence a post mortem examination. In this case the person who has the right was the AG, the police and the magistrate. The personal right that the plaintiff holds is to bury or cremate as the holder of the burial permit. It was further submitted that proviso (a) & (b) of the s. 44 must be read together that the person must be under a duty under any law for the time and the law here would be the relevant provisions of the Criminal Procedure Code. As to the instruction to bring the civil claim the plaintiff as the brother of the deceased is not a dependant of the deceased.

In this case it must be noted that counsel for the plaintiff did not or was unable to produce relevant authorities on ss. 44 and 45 of the Specific Relief Act.

Nevertheless I managed to obtain some authorities which were of assistance to me in deciding the requirements of s. 44 of the Specific Relief Act. I refer to the case of *Koon Hoi Chow v. Pretam Singh* [1972] 1 LNS 56. In that case Justice Sharma had this to say:

> Five conditions are laid down in s. 44 and these conditions are the five provisoes contained in the section which the applicant must satisfy. They are cumulative and all of them must be fulfilled. The question therefore is whether the applicant has succeeded in bringing his case within the purview of s. 44 of the Specific Relief Ordinance. Proviso (a) to s. 44 requires the applicant to show a personal right which it should be proved would be injured or defeated if the order is not made. In the course of the arguments, I asked the learned Counsel for the applicant what was that personal right of the applicant and he very rightly and frankly conceded that the personal right in the context of the application was in truth and substance the right to effectively defend the civil suit. That right, however, is against the plaintiff in the suit and not against the respondent. It has, however, been submitted that that right

against the plaintiff is worthless unless there is also an ancillary right against the respondent. I regret that that would be stretching the meaning of the words to limits which are apparently outside the scope and intent of the language of the said proviso. Again it was said that although the applicant has no statutory personal right conferred upon him, he still enjoys the common law right to get the information from the respondent. It was a bare assertion that such a common law right exists. It was not supported by any authority or reference and in the absence of such authority I am not inclined to support the view expressed by the learned Counsel. That is not the end of the matter. Proviso (b) requires that the doing or forbearing must be clearly incumbent on the person in his public character. There must be under the law some duty cast upon the public officer. If he does not do the duty, then the Court can call upon him to perform that duty. If he does it improperly or in an unauthorized manner the Court can call upon him to forbear from doing it in that particular manner. The applicant is in fact trying to ascertain the extent and amount of this liability to the infant. I cannot presume the existence of any legal duty on the part of the respondent unless it is pointed out how that duty arises or exists. No such effort has been made to establish the existence of such duty.

In the same case, the learned judge further laid down four prerequisites essential to the issue for an order under s. 44 of the Specific Relief Act and I further quote this judgment:

There are four prerequisites essential to the issue of an order under s. 44 or of a *mandamus*:

(1) Whether the applicant has a clear and specific legal right to the relief sought;

(2) Whether there is a duty imposed by law on the respondent;

(3) Whether such duty is of an imperative ministerial character involving no judgment or discretion on the part of the respondent; and

(4) Whether the applicant has any remedy, other than by way of mandamus, for the enforcement of the right which has been denied to him.

These are the questions, but only some of the questions, which are necessary to be answered in every application for mandamus. The applicant must show not only that he has a legal right to have the act performed but that the right is so clear and well defined as to be free from any reasonable controversy. The order cannot issue when the right is doubtful, or is a qualified one or where it depends upon an issue of fact to be determined by the respondent.

In fact the above prerequisites were followed by Hashim Yeop Sani J (as he then was) in the case of *Thein Tham Sang v. The United States Army Medical Research Unit & Anor* [1982] CLJ 820 and he had this to say:

> It seems to be settled law that before an order under s 44 (1) of the Specific Relief Act 1950 can be issued the conditions described in the proviso to that Section must be fulfilled. It also seems to be settled that the five conditions are cumulative in effect and that all of them need to be fulfilled. See *Koon Hoi Chow v. Pretam Singh* [1972] 1 MLJ 180.
>
> Under proviso (a) of s. 44(1) the applicant has to show that his personal right would be injured if the order is not made by the Court. Nowhere in the affidavit of the applicant here was it stated that he had such personal right or that the personal right would be injured if the order was not given.
>
> It would seen clear that proviso (b) to s. 44 (1) requires the applicant to show that it was clearly incumbent on the Industrial Court to hear and determine Industrial Court Case No. 72 of 1980.

The question before me was whether the plaintiff had satisfied all the conditions that are specifically spelt out under the proviso of s. 44. There is no doubt that s. 44 of the Specific Relief Act relates to the High Court judge's power to order a person holding a public office, a corporation or a subordinate court to do certain specific acts. It is noted that s. 45 of the Specific Relief Act must be looked into as it provides the procedure for making the application and the procedure and consequential steps that the judge has to adopt in dealing with the application. Section 45 of the Specific Relief Act reads as follows:

> Every application under section 44 must be founded on an affidavit of the person injured, stating his right in the matter in question, his demand of justice, and the denial thereof; and a Judge may, in his discretion, make the order applied for absolute in the first instance, or refuse it, or grant a rule to show cause why the order applied for should not be made. If, in the last case, the person, court, or corporation complains or shows no sufficient cause, the Judge may first make an order in the alternative, either to do or forbear the act mentioned in the order, or to signify some reason to the contrary and make an answer thereto by such day as the Judge fixes in this behalf.

As such in the present case, the application must be founded on an affidavit of the person injured stating his right in the matter in question his demand of justice and the denial thereof. Nowhere in the affidavit of the plaintiff was it stated that he had such personal right and that his personal right would be injured if the order is not given. In fact according to his affidavit, the plaintiff averred as follows:

Saya membawa tindakan sibil ini bagi pihak diri saya sendiri, keluarga si mati, bagi pihak keluarga kesemua mangsa-mangsa yang mati dalam tahanan polis/ dan juga bagi kesemua mangsa-mangsa kematian dalam tahanan polis/penjara yang akan datang.

I am unable to agree with Mr Manoharan's argument that the plaintiff's personal right would be injured and that his personal right is different from the legal right or personal right. In the same breath, the same counsel argued that the plaintiff had the legal right and that if any person said that he had no legal right, the burden was on him to proof. I failed to comprehend his conflicting argument. To my mind the argument alluded by him is illusory. Following the judgment in *Koon Hoi Chow v. Pretam Singh*, a personal right would mean a clear and specific legal right to the relief sought. In our case, there was no evidence before me whether he had a legal right under the said Act. It was only in the counsel's submission that the court was informed that he was the next of kin, being the brother with no parents.

As such I am of the opinion that the provision in s. 44(1)(a) has not been complied with.

The next point for the plaintiff to satisfy this court is proviso (b), which requires that the doing or forbearing must be clearly incumbent on the person in his public character. In other words there must be under the law some duty cast upon the public officer.

Section 334 and 335 CPC provides that a magistrate holding an inquiry into the cause of death of a person who died in police custody may order a post mortem examination even if a post mortem examination had been undertaken earlier.

On this point, counsel for the plaintiff merely stated that it was the duty of the defendant to perform the post-mortem and that the plaintiff was claiming under proviso (b) and (c) of s. 44 Specific Relief Act. What the learned plaintiff's counsel failed to see was that the five conditions are cumulative in effect and that all need to be fulfilled.

Mr. Ranjan further submitted that the deceased would be unclaimed body until the magistrate make an order under s. 335 CPC and that if there was a death in the police custody there should be an inquiry by the magistrate under s. 334 CPC. In this case since there is no order under 335(2) of the CPC, the defendant is not obliged to undertake a post mortem examination.

Counsel for the plaintiff, Mr. Manoharan on the other hand argued that they cannot refer to s. 335 because there was no inquiry and at this stage the plaintiff is not seeking for an inquiry and that the magistrate cannot exercise his or her right under s. 335 of the CPC. In addition, counsel for the plaintiff Mr. Surendram submitted that the magistrate has no role in the preliminary investigation and that the plaintiff cannot apply to the magistrate for a second post-mortem and had no choice but to come to this court for the order.

Based on this line of submission, the question that is before this court is whether it is incumbent upon Prof Nadesan to perform the second post mortem and the test is where is the duty imposed by law on the defendant?

From the reading of s. 335 of the CPC, there lies a duty on the defendant to perform a second post mortem should the magistrate order him to do so when there is an inquiry. Section 335 is stated as follows:

> 335 (1) A Magistrate holding an inquiry under this Chapter shall have all the powers which he would have in holding an inquiry into an offence.
>
> (2) A Magistrate holding an inquiry under this Chapter if he considers it expedient that the body of the deceased person should be examined by a Medical Officer in order to discover the cause of death may, whether a post-mortem examination has been made under section 331 or not, issue his order to a Medical Officer to make a post-mortem examination of the body, and may for that purpose order the body to be exhumed.

In this case, since there was no order of an inquiry, I am of the opinion that the defendant is not under any legal duty to perform the second postmortem and this court cannot presume the existence of any legal duty on the part of the defendant unless it is pointed out how that duty exists.

After giving due consideration to the application, the affidavits and the submission of the learned counsel for the plaintiff and the defendant, I come to the conclusion that the plaintiff fell short of satisfying these requirements as laid under s. 44(1)(a) and (b) of the Specific Relief Act 1950.

As such this application is dismissed with cost.